



Order 97-4-12
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**UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
OFFICE OF THE SECRETARY
WASHINGTON, D.C.**

Issued by the Department of Transportation
on the 9th day of April, 1997

LOS ANGELES INTERNATIONAL AIRPORT
RATES PROCEEDING

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Docket OST-97-2329
(50176)

SECOND LOS ANGELES INTERNATIONAL
AIRPORT RATES PROCEEDING

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Docket OST-95-474

ORDER ON REMAND

The Department of Transportation issued final decisions under 49 U.S.C. 47129 on the reasonableness of the landing fees charged at Los Angeles International Airport (LAX) from July 1, 1993 through June 30, 1995, and from July 1, 1995 to the present. We determined that the fees were unreasonable insofar as they included a rental cost for the airfield and apron land based on the land's estimated fair market value. Los Angeles International Airport Rates Proceeding ("First LAX Rates Proceeding"), Order 95-6-36 (June 30, 1995); Second Los Angeles International Airport Rates Proceeding ("Second LAX Rates Proceeding"), Order 95-12-33 (December 22, 1995). The City of Los Angeles ("the City") and the airline complainants sought judicial review of both decisions. The District of Columbia Circuit Court of Appeals remanded our decision in the First LAX Rates Proceeding on the land valuation issue, although it affirmed our decision insofar as the airline complainants had challenged it. City of Los Angeles Dept. of Airports v. Dept. of Transportation ("LAX I"), 103 F.3d 1027 (D.C. Cir. 1997).

Since we based our decision on the land valuation issue in the Second LAX Rates Proceeding on our rationale in the First LAX Rates Proceeding, Order 95-12-33 at

17, we asked the Court to remand the issue in that review proceeding as well. The Court granted our request on March 7, 1997. Air Transport Ass'n et al. v. Dept. of Transportation, D.C. Cir. Nos. 96-1018 et al. ("LAX II") (March 7, 1997 order).

In response to the Court's decision directing us to reexamine the City's arguments in favor of using fair market value for the airfield land in calculating landing fees, we are issuing this order to establish the procedures for that reexamination for both the first and second LAX cases.

BACKGROUND

Origins of the LAX Rate Proceedings

The City operates and owns Los Angeles International Airport ("LAX") and three other airports (Ontario, Van Nuys, and Palmdale). The City used the residual methodology for many years in calculating the landing fees at LAX. The airport's use of the residual methodology reduced the airlines' landing fees to the extent that the airport's non-airfield revenues from such sources as concessions and parking lots exceeded its non-airfield costs. When the airport's agreements with the airlines requiring the use of the residual fee methodology expired in 1993, the airport decided to switch to a compensatory methodology for calculating its landing fees. The airport's adoption of the compensatory fees meant that the airlines had to pay the entire amount of their airfield costs, which were no longer offset in part by the airport's surplus revenues from non-airfield sources. As a result, the landing fees charged the airlines in the fiscal year beginning July 1, 1993, were much higher than the fees charged in earlier years. First LAX Rates Proceeding, Order 95-6-36 at 5-6.

The compensatory methodology chosen by LAX bases the landing fees on the airport's costs for providing airfield facilities and services. Among the costs included in the airport's calculation was a charge reflecting the fair market value of the airfield land. First LAX Rates Proceeding, Order 95-6-36 at 19. However, as explained below, other airports using a compensatory methodology always based their charge for the cost of airfield land on the land's historic cost.

When the City increased the LAX landing fees, the airlines complained that the fees were unreasonable and unlawful under federal law. The airlines unsuccessfully sought to block the new fees by suing the City in federal district court. Air Transport Ass'n v. City of Los Angeles, 844 F. Supp. 550 (C.D. Calif. 1994).

In 1994 Congress enacted section 113 of the Federal Aviation Administration Authorization Act of 1994, P.L. 103-305 (August 23, 1994) ("the 1994

Authorization Act"), codified as 49 U.S.C. 47129, to establish expedited procedures for resolving significant disputes between an airport and airlines about the reasonableness of new or increased fees charged by the airport. Two federal statutes -- section 511 of the Airports and Airways Improvement Act of 1982, recodified as 49 U.S.C. 47107, and the Anti-Head Tax Act, recodified as 49 U.S.C. 40116 -- had long required airports like LAX to charge aeronautical users only reasonable fees. The expedited procedures created by the new statute were designed to give airlines a more effective means for resolving complaints that an airport's fees were unreasonable. First LAX Rates Proceeding, Order 95-4-5 (April 3, 1995) at 2-5.

As required by the 1994 Authorization Act, this Department and the Federal Aviation Administration ("FAA") adopted guidelines for determining the reasonableness of airport fees. We first adopted such guidelines in 1995, 60 Fed. Reg. 6906 (February 3, 1995) ("the Interim Policy Statement"), and last year replaced them with revised guidelines, 61 Fed. Reg. 31994 (June 21, 1996) ("the Final Policy Statement"). We also adopted procedural rules governing cases heard under 49 U.S.C. 47129. Rules of Practice for Proceedings Concerning Airport Fees, Subpart F, 14 C.F.R. Part 302, 60 Fed. Reg. 6919 (February 3, 1995).¹

The Department's Decisions on the Reasonableness of the LAX Fees

The enactment of 49 U.S.C. 47129 caused sixteen airlines to jointly file a complaint against the City which alleged that the LAX landing fees charged since July 1, 1993, were unreasonable. These airline complainants asked us to resolve the dispute over the fees' reasonableness under the new procedures established by that statute. They argued, among other things, that the fees were unreasonably high due to the airport's charge for the fair market value of the airfield land. First LAX Rates Proceeding, Order 95-4-5 at 7.

After presiding at the hearing, the Department's Chief Administrative Law Judge, John J. Mathias, issued a recommended decision finding that the landing fees were unreasonable insofar as the City had used the airfield land's fair market value instead of the land's historic cost in calculating the fees. See First LAX Rates Proceeding, Order 95-6-36 at 19-20.

On review we affirmed the Chief Judge's decision on the land valuation issue. In determining that the airfield land should be valued at historic cost, not fair

¹ The City and the Air Transport Association are seeking review of the Final Policy Statement. Air Transport Ass'n et al. v. U.S. Dept. of Transportation, D.C. Cir. Nos. 96-1253 et al. (filed July 19, 1996). The City is challenging the requirement in the Final Policy Statement that airfield fees must be based on historic cost. The City had also challenged the Interim Policy Statement's historic cost requirement, but the Court dismissed that challenge on mootness grounds. See LAX I, 103 F.2d at 1030, n. 1.

market value, we relied on the use of historic cost by all other airports, the administrative ease of determining historic cost, and the airport's ability to recover its out-of-pocket costs by using historic cost. Instead of relying on the Interim Policy Statement's guidelines, we relied instead on the record and arguments presented in the LAX case. First LAX Rates Proceeding, Order 95-6-36 at 19-26. As required by the statute, we directed the airport to refund the amount of the fees representing the excessive valuation of the airfield land. Id. at 45-46.

The City filed a petition for judicial review of our decision, as did the airline complainants. As requested by the City, we stayed our order requiring the payment of refunds pending judicial review, subject to the airport's posting a bond securing its refund obligation. Order 95-7-33 (July 25, 1995) at 10-13. The stay would remain in effect until the Court of Appeals issued its mandate on the City's petition for review of our final decision in the First LAX Rates Proceeding. Id. at 14.

The City also adopted new increased landing fees at LAX for the fiscal year beginning July 1, 1995, just before we issued our final decision in the First LAX Rates Proceeding. The new fees also included a charge for the fair market value of the airfield land. We advised the City that it could not include a charge that we had found was unreasonable. Order 95-7-33 at 13-14.

The City and the airlines then agreed on an escrow arrangement for the fees payable since July 1, 1995, whereby the portion of the fee representing the fair market value charge for the airfield land would be paid into an escrow account until the courts issued a final decision on review of our determination disallowing the airport's fair market value charge. The airport could only obtain the escrowed funds if the courts reversed our decision on the land valuation charge. We therefore stayed our determination prohibiting the airport's use of fair market value pending judicial review. Orders 95-9-8 (September 8, 1995) and 95-12-34 (December 22, 1995). That stay would remain in effect until there was a final non-reviewable judicial decision on our decision in the First LAX Rates Proceeding on the land valuation issue. Order 95-12-34 at 4.

In the meantime fifty-nine airlines filed a complaint alleging that the landing fees charged at LAX since July 1, 1995, were unreasonable. After another hearing under 49 U.S.C. 47129, we issued a decision finding that the fees were unreasonable on several grounds, including the airport's use of the fair market value charge for the airfield land. We based our decision on the land valuation charge on the rationale and evidence used in the First LAX Rates Proceeding, since the parties had submitted no new evidence on this issue in the second proceeding. Second LAX Rates Proceeding, Order 95-12-33 at 17.

The City and the airline complainants sought judicial review of our final decision in the Second LAX Rates Proceeding. Air Transport Ass'n et al. v. Dept. of Transportation, D.C. Cir. Nos. 96-1018 (filed January 22, 1996) ("LAX II").

The Remand by the Court of Appeals

As the Court construed our order in the First LAX Rates Proceeding, we had concluded that federal law prohibited the use of fair market value in calculating landing fees, and we therefore had not adequately addressed the City's arguments in favor of fair market value. LAX I, 103 F.3d at 1032. The Court also read our decision as having unreasonably assumed that only out-of-pocket costs were relevant costs for ratemaking purposes and that opportunity costs were not relevant. Ibid.

The Court further questioned the rationale for disallowing the fair market value charge insofar as we had relied on the universal practice of other airports of using historic cost for calculating landing fees and on the relative difficulty of determining the fair market value of airfield land. On the basis of a belief that LAX was the first airport to charge compensatory fees instead of residual fees, the Court considered our reliance on the practices of other airports unpersuasive. 103 F.3d at 1033. The Court further reasoned that we had wrongly relied on the difficulty of valuing airfield land, since the Court believed that valuing land would not be difficult, especially since the airline complainants in this proceeding had not challenged the appraisal used by the City in calculating the airfield land's fair market value, and since the Court assumed that the City would not recalculate the land's fair market value in future years. 103 F.3d at 1033.

We determined not to seek rehearing or rehearing en banc of the Court's decision. As noted above, the Court also granted our request to remand the land valuation issue in the review proceeding on the Second LAX Rates Proceeding so that we could consider the issue together with the issue remanded by the Court's decision in City of Los Angeles Department of Airports.

THE PROCEDURES AND ISSUES FOR THE REMAND PROCEEDING

Procedures

In view of the Court's remand of the land valuation issue in both cases, we are starting this proceeding to reexamine the issue as directed by the Court.

Since the parties relied on the same evidence and arguments in both LAX proceedings, we will hold one proceeding to consider whether the airport may

include a charge for the fair market value of the airfield land for the fees charged from July 1, 1993, through June 30, 1995, and the fees charged since July 1, 1995.

The statute requires expedited procedures for our original decision on the reasonableness of an airport fee, *see* Order 95-4-5 at 3, but is silent on the procedures to be used if a Court of Appeals remands a decision under 49 U.S.C. 47129. While the statute sets no procedures for a remand proceeding, we intend to resolve the land valuation issue promptly while still establishing procedures that will give the parties an adequate opportunity to address the issues and give us an opportunity to carefully consider the parties' arguments and the record before issuing a final decision on remand.²

We will therefore give the parties thirty days from the issuance of this order to file briefs on the issue remanded by the Court and fifteen days from the due date for briefs to file reply briefs on the issue. We will then issue a final decision as soon as reasonably possible.

The three parties entitled to file briefs shall be the City, the airline complainants entitled to refunds under 49 U.S.C. 47129 in the first and second LAX cases (together with the Air Transport Association, an intervenor), and the intervenor, the Airports Council International -- North America ("ACI"). The City and these airline complainants were the parties that introduced the evidence on the land valuation issue and submitted the principal briefs on the substantive issues in each case. *See, e.g., First LAX Rates Proceeding*, Order 95-4-5 at 20, 29. We will not accept any briefs from the other airline groups that did not file timely complaints in the *First LAX Rates Proceeding*. The complainants can adequately represent their interests, and in any event the Court affirmed our decision that the airlines that filed untimely complaints are not entitled to refunds under 49 U.S.C. 47129. 103 F.3d at 1035-1039.

The page limits for the briefs will be twenty-five pages for each opening brief filed by the airline complainants and the City, and twelve pages for each reply brief filed by the complainants and the City. Since this case involves only the fees charged by LAX and since the Final Policy Statement will govern any fee cases involving other airports, we believe that ACI will need a limited opportunity to comment on the issue remanded by the Court. We will therefore allow ACI to file a ten-page opening brief and a five-page reply brief.

² None of the parties has filed suggestions for the procedures that should be used in this remand proceeding. Our staff informally advised counsel for the City and the airline complainants that we were likely to give the parties the opportunity to file briefs and reply briefs before deciding the valuation issue on remand.

We have tentatively decided not to reopen the record in these cases. Our procedural rules for cases considered under 49 U.S.C. 47129 require each party to file all of its evidence before we determine whether a complaint should be referred to an ALJ for a formal hearing, subject to certain limited exceptions. We imposed that requirement to enable us to complete a proceeding within the deadlines set by the statute. See, e.g., First LAX Rates Proceeding, Order 95-4-5 at 23-24. We have strictly enforced that requirement. For example, we have barred parties from raising new arguments after we set a case for hearing. Second LAX Rates Proceeding, Order 95-12-33 at 28-30. We think the record before us should be sufficient for deciding the land valuation issue on remand. Moreover, given our rules' prohibition against the submission of new evidence after we determine whether to hold a formal hearing on a complaint, it would be contrary to our usual practice to allow a party to submit new evidence at this stage of the case.

However, if a party believes that there is additional evidence that we should accept, it should submit that evidence with its opening brief and explain why the current record must be supplemented with new evidence. Similarly, any party that believes that we should use other procedures for this remand proceeding should say why in its opening brief. Since we are allowing parties to suggest additional or alternative procedures in their opening briefs, we will not accept petitions for reconsideration of this order.

Issues

We will only consider the land valuation issue in this remand proceeding. That is the only issue remanded by the Court, so our decisions on all other issues in both LAX proceedings are therefore final.³

In their briefs and reply briefs the parties may make any arguments they consider appropriate on the reasonableness of the airport's fair market value charge. The parties should, of course, address the opportunity cost arguments and economist testimony cited by the Court, 103 F.3d at 1033-1034.

To help us carry out the reexamination of the land valuation issue directed by the Court, we also ask the parties to address the following points, based on the existing record. As directed by the Court, we will consider the City's opportunity cost arguments. In addressing those arguments, the parties should comment on such factors as the airport's role in the City's economy and in

³ The City and the airline petitioners in LAX II had agreed that they would raise only the reasonableness issues raised by them in LAX I. After the Court affirmed our decision in the First LAX Rates Proceeding insofar as the airlines had challenged it, the airline complainants withdrew their petition for review in LAX II.

furthering the welfare of the City's residents. The parties should also state whether and how this issue should be affected by the City's promises to maintain LAX as an airport in return for the City's acceptance of federal grants and donations of federal land, promises which were discussed in the Final Policy Statement, 61 Fed. Reg. 32011, and by the statutory prohibition against revenue diversion, 49 U.S.C. 47107(b). The parties should, of course, present any other arguments that they consider relevant to this issue.

With respect to the Court's belief that the City did not plan to periodically adjust the fair market value of the airfield land, 103 F.3d at 1033, the parties should state whether the record contains any evidence on this question. The parties should also comment on whether the City's economic rationale for valuing the airfield land at fair market value would call for periodic revaluations of the airfield land. The Court also stated that we could not reasonably rely on an analogy with the difficulties of valuing utility plants as discussed in Duquesne Power & Light Co. v. Barasch, 488 U.S. 299, 308-309 (1989), 103 F.3d at 1033. However, we believe that the relative difficulty of valuing airfield land may be relevant to our final decision, and we ask the parties to address this issue as well. In that regard, we note that the Final Policy Statement relies on the comparative difficulty of assessing the fair market value of airfield land as a factor in requiring the use of historic cost for valuing airfield assets. 61 Fed. Reg. 32010.

As noted, the Court dismissed our reliance on the universal use by other airports of historic cost as the method for valuing airfield assets, on the ground that we had allegedly stated that LAX was the first airport to use compensatory fees. 103 F.3d at 1033. We believe the Court's statement to be incorrect, since we made no such statement and since a large number of airports have used compensatory fees, as shown by the City's own evidence. Brown Declaration at 4-5. The Final Policy Statement similarly observed that over forty percent of large and medium-sized airports used compensatory fees, according to a 1984 report. 61 Fed. Reg. 32007. The parties, however, are free to address the use by other airports of historic cost as a factor that we should consider in this remand proceeding.

THE EXTENSION OF THE STAY

The current stay of the refund obligation imposed by our decision in the First LAX Rates Proceeding by its terms expires on the issuance of the mandate in LAX I. Order 95-7-33 at 14. However, since the Court has directed us to reexamine the land valuation issue and has not affirmed our decision, we must extend the stay of the City's refund obligation until the courts finally decide whether the City may include a charge for the fair market value of the airfield land (such a decision would result either from our decision on remand to

disallow the fair market value charge or from a possible airline challenge to a decision by us on remand to allow the charge).

We also granted the City a stay of our determination barring the use of the airfield land's fair market value in calculating the landing fees. Order 95-12-34 at 4. Since that stay will be effective until a final decision by the courts on the validity of our decision on the land valuation issue, we believe that the stay remains in effect and that we do not need to take any action on this matter.

The escrow agreement between the City and the airlines is not being administered by us, although the agreement was the basis for our orders staying the prohibition against the use of fair market value. However, that agreement apparently will remain in effect until there is a final decision by the courts on the land valuation issue.

ACCORDINGLY:

1. An opening brief no longer than twenty-five pages in length and a reply brief no longer than twelve pages in length may be filed by each of the following two parties: (i) the respondents, the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners, and (ii) all of the airline complainants in these cases that filed a complaint satisfying the jurisdictional standards of 49 U.S.C. 47129;
2. Intervenor Airports Council International -- North America may file an opening brief no longer than ten pages in length and a reply brief no longer than five pages in length;
3. Opening briefs shall be filed within thirty days of the issuance of this order and reply briefs shall be filed within fifteen days of the due date for opening briefs;
4. We will not accept petitions for reconsideration of this order; and
5. We stay the obligation of the respondents, the City of Los Angeles, the City of Los Angeles Department of Airports, and the Los Angeles Board of Airport Commissioners, under ordering paragraph 4 of Order 95-6-36 (June 30, 1995) until there is a final, non-reviewable judgment on the Department's decision in the Los Angeles International Airport Rates Proceeding, Order 95-6-36 (June 30, 1995), that the respondents may not use the fair market value of the airfield and apron land in calculating landing fees at Los Angeles International Airport.

By:

PATRICK V. MURPHY
Deputy Assistant Secretary for Aviation
and International Affairs

(SEAL)